No. 86-1638

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

LEE ENTERPRISES, INC., AN IOWA CORPORATION AND DONALD SCHWENNESEN,

Petitioners,

vs.

WARREN E. SIBLE,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE OF AMERICAN NEWSPAPER PUBLISHERS ASSOCIATION, AMERICAN SOCIETY OF NEWSPAPER EDITORS, AND REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS IN SUPPORT OF PETITION FOR CERTIORARI

RICHARD M. SCHMIDT, JR.
Cohn and Marks
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 293-3860
Attorney for Amicus Curiae American Society of Newspaper Editors

*ARTHUR D. MCKEY
GREGORY P. SCHERMER
Hanson, O'Brien, Birney & Butler
888 17th Street, NW, Suite 1000
Washington, DC 20006
(202) 298-6161
Attorneys for Amici Curiae

JANE E. KIRTLEY
800 18th Street, NW
Suite 300
Washington, DC 20006
(202) 466-6313
Attorney for Amicus Curiae Reporters Committee for Freedom of the Press

W. TERRY MAGUIRE
P.O. Box 17407
Dulles International Airport
Washington, DC 20041
(703) 648-1000
Attorney for Amicus Curiae American Newspaper Publisher Association

* Counsel of Record

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Your amici respectfully request leave to file the attached brief on behalf of the American Newspaper Publishers Association, the American Society of Newspaper Editors and the Reporters Committee for Freedom of the Press in support of the Petition for Certiorari of Lee Enterprises, Inc. and Donald Schwennesen. Petitioners have consented to the filing of this brief. A copy of said letter of consent has been filed with the Clerk of this Court. Respondent has declined to consent to the filing of this brief.

The American Newspaper Publishers Association ("ANPA") has over 1,400 members throughout the country, including numerous newspapers in Montana. The American Society of Newspaper Editors ("ASNE") is the nationwide, professional organization of daily newspaper editors with 950 members nationwide, including numerous Montana members. The Reporters Committee for Freedom of the Press is a voluntary association of working journalists dedicated to protecting the First Amendment. All three amici are gravely concerned about the impact of the Montana Supreme Court's decision in this case upon their members.

Your amici are familiar with the questions involved and the scope of their presentation and believe there is a necessity for additional argument as to whether the Montana Supreme Court applied an unconstitutional standard in reviewing the evidence of actual malice, and whether that court failed to properly apply the definition of actual malice as set forth in this Court's opinion in *St. Amant* v. *Thompson*. Additional argument is particularly appropriate in light of Petitioners' request for summary reversal. The attached brief sets forth additional authorities which are presented in order to assist this Court in summarily deciding this case on the merits.

Because of the important issues of Federal Constitutional law presented in this case, your amici urge this Court to grant the Motion for Leave to File the attached Brief Amici Curiae.

Respectfully submitted,

RICHARD M. SCHMIDT, JR.
Cohn and Marks
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 293-3860
Attorney for Amicus Curiae American Society of Newspaper Editors

ARTHUR D. MCKEY
GREGORY P. SCHERMER
Hanson, O'Brien, Birney & Butler
888 17th Street, NW,
Suite 1000
Washington, DC 20006
(202) 298-6161
Attorneys for Amici Curiae

JANE E. KIRTLEY
800 18th Street, NW
Suite 300
Washington, DC 20006
(202) 466-6313
Attorney for Amicus Curiae Reporters Committee for Freedom of the Press

W. TERRY MAGUIRE
P.O. Box 17407
Dulles International Airport
Washington, DC 20041
(703) 648-1000
Attorney for Amicus Curiae American Newspaper Publisher Association

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PRELIMINARY STATEMENT

The American Newspaper Publishers Association, the American Society of Newspaper Editors, and the Reporters Committee for Freedom of the Press submit this brief *amici curiae* in support of the Petition for Certiorari filed by Lee Enterprises, Inc. and Donald Schwennesen.

INTEREST OF THE AMICI

American Newspaper Publishers Association ("ANPA") is a non-profit membership corporation organized under the laws of the Commonwealth of Virginia. Its membership consists of more than 1,400 newspapers constituting over 90 percent of the total daily and Sunday newspaper circulation, and a substantial portion of the weekly newspaper circulation in the United States. Numerous newspapers published in various parts of Montana hold membership in ANPA.

Concerned with the issues of general significance to the profession of journalism and the newspaper publishing business, ANPA seeks to keep its members informed of, and to provide meaningful input on, matters touching on these concerns. The Association's member newspapers, individually and through ANPA, are ever vigilant to protect the public's right under the First Amendment to the information concerning the activities of government and matters of public interest.

The American Society of Newspaper Editors ("ASNE") is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States. The purposes of the Society, which was founded over fifty years ago, include the maintenance of "the dignity and rights of the profession" (ASNE Constitution, Preamble) and the ongoing responsibility to improve the manner in which the journalism profession carries out its responsibilities in providing an unfettered and effective press in the service of the American people.

The Reporters Committee for the Freedom of the Press is a voluntary, unincorporated association of working news reporters and editors dedicated to protecting the First Amendment and freedom of information interests of the news media and the public. Since its founding in 1970, the Reporters Committee has appeared in virtually every significant press freedom case considered by the U.S. Supreme Court.

The decision of the Montana Supreme Court in the instant case, while clearly an aberration, represents a serious departure from libel jurisprudence as established by this Court, and, therefore, is of significant interest to the members of ANPA, ASNE, and the Reporters Committee for the Freedom of the Press, all of whom cherish their right and their duty to inform the public on matters involving the conduct of public officials.

Your amici appreciate this opportunity to present these views, and we urge this Court to grant the Petition for Certiorari and to summarily reverse the opinion below.

SUMMARY OF ARGUMENT

Summary Reversal.

In reversing the jury's verdict in favor of the newspaper, the Montana Supreme Court committed two serious constitutional errors. The court conducted a review of the evidence in the light most favorable to a libel plaintiff who in this case was the losing party. Such a procedure is directly contrary to this Court's decision in *Bose* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). The court also rejected an actual malice jury instruction based upon the verbatim language in *St. Amant* v. *Thompson*, 390 U.S. 727 (1968). Where an order abridges freedom of the press in violation of the First and Fourteenth Amendments, summary reversal is mandated. *Oklahoma Publishing Co.* v. *District Court*, 430 U.S. 308, 311-12 (1979) (Petition for Certiorari granted and judgment summarily reversed where court's order abridged First Amendment).

De Novo Review Under Bose.

The court below failed to conduct an independent review of the evidence as required by this Court in *Bose* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). Instead, the court below viewed the evidence in the light most favorable to the plaintiff who in this case was the losing party. Independent review means *de novo* review, *id.* at 508 n.27. The rule of independent *de novo* review is never satisfied by viewing the evidence in the light most favorable to a libel plaintiff, particularly where, as here, the plaintiff was the losing party at trial.

Rejection of the St. Amant *Instruction.*

The Montana Supreme Court's rejection of the *St. Amant* jury instruction, and the court's refusal to even acknowledge the existence of the case is clear error requiring summary reversal.

Reversal of the Jury's Verdict.

The court's reversal of the jury's verdict in favor of the newspaper violates the First Amendment. Acting on proper

instructions, the jury below performed its historical function of protecting freedom of expression from improper judicial interference. Where the jury has acted to protect freedom of expression, the court should not interfere. See Parker, *Free Expression — The Jury Function*, 65 B.U.L. Rev. 483, 495 (1985) (and authorities cited therein).

ARGUMENT

I. THIS COURT SHOULD SUMMARILY REVERSE THE OPINION OF THE MONTANA SUPREME COURT BECAUSE OF THE TWO GRAVE DEPARTURES FROM ESTABLISHED CONSTITUTIONAL PRINCIPLES IN THIS FIRST AMENDMENT CASE.

In this public official libel case, the court below reversed the verdict of a unanimous jury which found that the newspaper did not publish the article with actual malice. In so doing, the Montana Supreme Court committed errors of Constitutional magnitude which are so blatant as to warrant summary reversal under Supreme Court Rule 23.1. Where the order of the court below abridges freedom of the press in violation of the First and Fourteenth Amendments, summary reversal is particularly appropriate. *Oklahoma Publishing Company* v. *District Court*, 430 U.S. 308, 311-12 (1979) (Petition for Certiorari granted and judgment summarily reversed where court's order abridges freedom of the press).

The first and most obvious error committed by the court below is its failure to apply the proper standard of review mandated by this Court in *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). Despite this Court's clear pronouncements in *Bose*, the court below failed to conduct an independent *de novo* review of the evidence of actual malice. Instead, the court viewed the evidence in the light most favorable to the plaintiff, who in this case was the *losing* party.

In *Bose*, this Court held that a reviewing court is not to defer to the trier of fact's affirmative finding of actual malice, but

"must exercise *independent* judgment and determine whether the record establishes actual malice with convincing clarity." 466 U.S. at 514 (emphasis added). The rule of independent review is designed to protect libel defendants to ensure that a libel "judgment does not constitute a forbidden intrusion on the field of free expression," *New York Times*, 376 U.S. at 285 (footnote omitted). The independent review required by *Bose* is not satisfied by reviewing the evidence in the light most favorable to the plaintiff, particularly where plaintiff is *not* the prevailing party.

The second and equally serious error is the Court's rejection of the actual malice jury instruction which was taken almost verbatim from this Court's opinion in *St. Amant* v. *Thompson*. In refusing to follow *St. Amant*, or even to acknowledge its existence, the Montana Supreme Court has departed from the firmly established definition of actual malice in a manner unprecedented in libel jurisprudence.

Because of these egregious constitutional errors, this Court should grant the Petition for Certiorari and summarily reverse the court below.

II. THE MONTANA SUPREME COURT FAILED TO CONDUCT AN INDEPENDENT *DE NOVO* REVIEW OF ALL THE EVIDENCE GERMANE TO THE ACTUAL MALICE DETERMINATION.

The Montana Supreme Court applied an unconstitutional standard of review in direct contravention of this Court's pronouncement in *Bose* v. *Consumers Union of the United States*. In its opinion below, the Court stated:

> First, we must review the evidence in the light most favorable to the appellants and then determine whether the Court's instructions adequately presented appellants' case to the jury.

Petition for Certiorari, App. A at 2.

This Court has never addressed the question of the proper standard of review where the plaintiff is the *losing* party as is the

case here. *Bose* makes it clear, however, that a reviewing court must never view the evidence in the light most favorable to a libel plaintiff, but at a minimum must conduct an independent *de novo* review.[1]

A. Introduction: The Constitutional Rule of Independent, *De Novo* Review under *Bose*.

This Court held in *Bose* that a reviewing court is not to defer to the trier of fact's affirmative finding of actual malice, but "must exercise *independent* judgment and determine whether the record establishes actual malice with convincing clarity." 466 U.S. at 514 (emphasis added). In earlier cases, including *New York Times*,[2] this Court had noted its own obligation to

> examine for ourselves the statements in issue and the circumstances under which they were made to see . . . whether they are of a character which the principles of the First Amendment . . . protect." . . . We must "make an independent examination of the whole record" . . . so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression.

376 U.S. at 285 (citations deleted) (footnote omitted).

In *Bose*, this Court emphasized that this obligation of independent review "is a rule of federal constitutional law" that binds not only the Supreme Court, but any court reviewing a libel

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[1] Your amici urge this Court to adopt the rule that where a jury finds an absence of clear and convincing evidence of actual malice, that the reviewing court is prohibited by the First Amendment from overturning such a verdict. See Argument IV, *infra* at 15. Regardless of whether this Court adopts the rule outlined above, it is beyond question that the Montana Supreme Court's disregard of *Bose* is grounds for summary reversal.

[2] See also *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 54 (1971) (Opinion of Brennan, J.); *Time, Inc.* v. *Pape*, 401 U.S. at 284; *Greenbelt Cooperative Publ. Ass'n.* v. *Bresler*, 398 U.S. 6, 11 (1970); *Beckley Newspapers* v. *Hanks*, 389 U.S. at 82.

judgment. 466 U.S. at 510. The rule of independent review, this Court explained,

> reflects a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. The question whether the evidence in the record in a defamation case is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact. *Judges, as expositors of the Constitution, must independently decide whether the evidence in the record is sufficient to cross the constitutional threshold and bars the entry of any judgment that is not supported by clear and convincing proof of "actual malice."*

Id. at 510-11 (emphasis added).

Independent review, this Court emphasized in *Bose*, means "*de novo* review." *Id.* at 508 n.27. Even though the actual malice determination turns on "largely factual questions," *Id.* at 501 n.17, it " 'involves not really an issue of fact but a question of constitutional *judgment* of the most sensitive and delicate kind.' " *Id.* at 507 n.25, quoting *Roth* v. *United States*, 354 U.S. 476, 498 (1957) (emphasis in original). The "stakes" involved in that judgment — "in terms of impact on future cases and future conduct — are too great to entrust them finally to the judgment of the trier of fact." 466 U.S. at 501 n.17. Reviewing courts " 'cannot avoid making an independent constitutional judgment on the facts of the case.' " *Id.* at 508 n.27, quoting *Jacobellis* v. *Ohio*, 378 U.S. 184, 190 (1964) (Opinion of Brennan, J.). And that judgment is to be based neither on what the trier of fact found nor, in the case of jury trials, on what the court presumes the jury found. It must constitute the reviewing court's "*independent assessment . . . of the evidence germane to the actual malice determination.*" *Id.* at 514 n.31 (emphasis added).

B. The Rule of Independent, *De Novo* Review is Not Satisfied by Reviewing the Evidence in the Light Most Favorable to the Plaintiff.

The independent review required by *Bose* is quite different from the standard generally applicable to appellate review. Ordinarily such review requires the court to view the evidence in the light most favorable to the prevailing party, and to give that party the benefit of all inferences that can reasonably be drawn from the evidence. The ordinary standard permits an appellate court to review the evidence giving all permissible inferences in favor of the prevailing party is met only when the evidence, viewed in that light, is so one-sided that reasonable men could not disagree on the verdict. That standard of review, which imposes a heavy burden upon the appellant reflects the deference generally accorded to a jury verdict and the presumption in favor of its validity.

By contrast, the review required by *Bose*, where a jury has found actual malice, is independent, "*de novo* review." 466 U.S. at 508 n.27. The reviewing court's judgment is "independent" of the trier of fact's decision, and uninfluenced by any deference or presumption in favor of its validity.

In *Bose*, a case tried to a district court judge, the Court held squarely that the clearly erroneous standard of Rule 52(a)[3] is inapplicable to the review of an actual malice determination.

> We hold that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times* v. *Sullivan. Appellate*

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[3] Rule 52(a) of the Federal Rules of Civil Procedure then provided that "[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

> *judges in such a case must exercise independent judgment and determine whether the record establishes actual malice with convincing clarity.*

466 U.S. at 514 (footnote omitted) (emphasis added). As this Court explained, the difference between Rule 52(a), which accords a "presumption of correctness" to the trial court's findings, and the constitutional rule of independent, *de novo* review "is much more than a mere matter of degree." *Id.* at 501. There is no "presumption" at all under the rule of independent review.

That is not to say that the role of the jury is eliminated in First Amendment cases. The jury's verdict is entitled to traditional deference with respect to many of the factual issues in such cases. "[O]nly those portions of the record which relate to the actual malice determination must be independently assessed." *Id.* at 514 n.31. This deference should be particularly strong where, as here, the jury found in favor of the defendants.

Bose and prior Supreme Court decisions, including *New York Times*, illustrate the proper application of the constitutional rule of independent, *de novo* review. In *Bose*, the issue was whether the defendant had disparaged plaintiff's stereo speakers by reporting that the sound they produced "tended to wander about the room." 466 U.S. at 488. The author of the report, Seligson, testified that the movement he heard was a "back and forth movement along the wall," *id* at 495, and that he intended the words "about the room" to describe that movement. "After careful consideration of Seligson's testimony and his demeanor at trial," the district court rejected his testimony that the words he used ("about the room") actually described what he heard ("along the wall") as "not credible." *Id.* at 497 (emphasis added). Because Seligson "knew" the words he used "did not accurately describe the effects that he . . . heard," the court found actual malice. *Id.* at 498. See also *id.*, at 511-512.

Had this Court viewed the evidence in the light most favorable to the plaintiff, it certainly would have upheld the trial

judge's findings. Addressing the significance of Seligson's testimony, this Court stated:

> Seligson displayed a capacity for rationalization. He had made a mistake and when confronted with it, he refused to admit it and steadfastly attempted to maintain that no mistake had been made — that the inaccurate was accurate. That attempt failed, but the fact that he made the attempt does not establish that he realized the inaccuracy at the time of publication.

466 U.S. at 512.

In short, this Court brought to bear its own independent judgment and rejected the trial court's conclusion, *even though that conclusion rested heavily upon the trial court's explicit assessment of the demeanor and credibility of the principal witness* on the critical issue in the case.

In *New York Times,* a jury case, the Times had news stories in its own files that revealed the publication's falsity. 376 U.S. at 286-87. This Court did not view this evidence, and all inferences that could reasonably have been drawn from it, in the light most favorable to the plaintiff. Rather, it made its own independent assessment of the evidence and entered judgment for the defendant.

In *Time, Inc.* v. *Pape*, Time Magazine erroneously reported a civil rights commission's summary of allegations of police brutality in a private complaint as independent findings of the commission. 401 U.S. at 282. In a libel suit brought by one of the police officers involved in the incident, the district court granted Time's motion for a directed verdict. The Court of Appeals reversed, concluding that "the omission of the word 'allegation' or some equivalent was a 'falsification' of the Report," and that "[s]ince the omission was admittedly conscious and deliberate," the issue of actual malice was "one for the jury." *Id.* at 285.

Had this Court viewed the evidence, and the reasonable inferences therefrom, in the light most favorable to the plaintiff, it certainly would have agreed with the court of appeals that a

directed verdict should not have been entered. There is an obvious difference between allegations in a private complaint and findings of a government commission, and it presumably would not have been unreasonable to infer that Time "entertained serious doubts as to the truth" of its publication when it "consciously" chose to present what in fact were mere private allegations as commission findings. This Court, however, did not review the evidence in the light most favorable to the plaintiff. Instead, this Court assessed the evidence independently and held that Time was entitled to judgment.

These cases make clear that an appellate court's review of the actual malice issue is not governed by Rule 52(a)'s clearly erroneous standard, or by the standard ordinarily applied to motions for a directed verdict and judgment n.o.v., or the ordinary standard of appellate review. The First Amendment mandates that the appellate court must not review the evidence in the light most favorable to the plaintiff, particularly where the plaintiff is the *losing* party at trial. It must conduct its own "*de novo* review" of the evidence, 466 U.S. at 508 n.27, and reach its own "independent judgment . . . whether the record establishes actual malice with convincing clarity." *Id.* at 514.

The Supreme Courts of California and Illinois have recently addressed the issue of the appropriate standard of review of the evidence of actual malice and both have concluded that *Bose* requires independent *de novo* review. In *McCoy* v. *Hearst Corporation*, 41 Cal.2d 835, 231 Cal. Rptr. 518, 727 P.2d 711, 13 Media L. Rptr. 2169 (1986), *cert. denied*, ____ U.S. ____ (May 4, 1987), a unanimous California Supreme Court reversed a $4,500,000 judgment after conducting an independent *de novo* review. The court specifically held that:

> This court is not bound to consider the evidence of actual malice in the light most favorable to respondents [plaintiffs] or to draw all permissible inferences in favor of respondents. To do so would compromise the independence of our inquiry.

13 Media L. Rptr. at 2173.

In *Wanless* v. *Rothballer*, ____ Ill. ____, 13 Media L. Rptr. 1849 (1986), the Illinois Supreme Court similarly found that *Bose* requires an independent "*de novo*" review. 13 Media L. Rptr. at 1852. See also *Dombey* v. *Phoenix Newspapers*, 724 P.2d 562 (Ariz. 1986); *Gazette* v. *Harris*, 325 S.E.2d 713 (Va. 1985) (Bose requires independent review of evidence of actual malice).

The only court which has departed from the rule of independent review set forth by this Court in *Bose* is the Montana Supreme Court in the instant case.

III. THE MONTANA SUPREME COURT'S FAILURE TO ACKNOWLEDGE THE CONSTITUTIONAL RULE ENUNCIATED BY THIS COURT IN *ST. AMANT* V. *THOMPSON* IS REVERSIBLE ERROR.

The Montana Supreme Court's rejection of the jury instruction based upon the verbatim language of *St. Amant* and the court's failure to even acknowledge the existence of the case is clear error warranting summary reversal.

In *New York Times* v. *Sullivan*, 376 U.S. 254 (1964), this Court established constitutional protections for media defendants in defamation actions. The Court held that public officials must prove by clear and convincing evidence that defamatory statements were published with actual malice; that is, with knowledge of falsity or reckless disregard for truth. In rejecting the common law rules of strict liability and presumed damages, this Court reaffirmed its commitment to the principle that uninhibited discussion of the conduct of public officials was fundamental to the operation of the American system of government. *Id.* at 270.

> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in the amount — leads to . . . self-censorship.

Id. at 297.

In *Garrison* v. *Louisiana*, 379 U.S. 64, 74 (1964), this Court held that actual malice in the form of reckless disregard for truth requires "a high degree of awareness of their probable falsity."

This Court further refined the definition of actual malice in *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968), holding that "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication."

> "Reckless disregard," it is true, cannot be fully encompassed in one infallible definition. Inevitably its outer limits will be marked out through case-by-case adjudication, as is true with so many legal standards for judging concrete cases, whether the standard is provided by the Constitution, statutes, or case law. Our cases, however, have furnished meaningful guidance for the further definition of a reckless publication. In *New York Times, supra*, the plaintiff did not satisfy his burden because the record failed to show that the publisher was aware of the likelihood that he was circulating false information. In *Garrison* v. *Louisiana*, 379 U.S. 64 (1964), also decided before the decision of the Louisiana Supreme Court in this case, the opinion emphasized the necessity for a showing that a false publication was made with a "high degree of awareness of . . . probable falsity." 379 U.S. at 74. Mr. Justice Harlan's opinion in *Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153 (1967), stated that evidence of either deliberate falsification or reckless publication "despite the publisher's awareness of probable falsity" was essential to recovery by public officials in defamation actions. These cases are clear that reckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the

> truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice.

Id. at 730-31.

This Court's ruling in *St. Amant* identified the following evidence that may be employed to attempt to establish "actual malice":

> 1. The communication has been fabricated by the defendant;
>
> 2. It is the product of the defendant's imagination;
>
> 3. It is based wholly on an unverified anonymous telephone call;
>
> 4. It contains allegations that are so inherently improbable that only a reckless person would put them in circulation;
>
> 5. It is published despite obvious reasons to doubt the veracity of the informant upon whom the article is based or the accuracy of his reports.

It is undisputed that mere failure to investigate does not in itself establish "actual malice." *St. Amant, supra,* at 733. It is equally well settled that a mistake in interpreting events or documents does not evidence the necessary state of mind. *Time. Inc.* v. *Pape*, 401 U.S. 279 (1971); *Orr* v. *Argus-Press Co.*, 586 F.2d 1108 (6th Cir. 1978), *cert. denied,* 440 U.S. 960 (1979). Publishing facts harmful to the plaintiff while not publishing others that were mitigating does not constitute actual malice. *Reliance Insurance Co.* v. *Barron's,* 442 F. Supp. 1341, 1352 (S.D.N.Y. 1977). It is similarly insufficient for a plaintiff to point to vituperation or exaggerated language. *Guthrie* v. *Annabel,* 50 Ill. App.3d 969, 365 N.E.2d 1367, 3 Media L. Rep. (BNA) 1152 (1977); *Rose* v. *Koch,* 278 Minn. 235, 154 N.W.2d 409 (1967). Such evidence does not indicate a publisher's lack of belief in the truth of his statements.

Investigative failures, if they do not in context indicate knowledge of falsity or subjective awareness of probable falsity, cannot themselves constitute "actual malice." *St. Amant* v. *Thompson, supra,* at 733. This Court has reaffirmed the rule set forth in *St. Amant* without reservation or modification in numerous cases in recent years.[9]

The Montana Court's failure to even acknowledge the existence of *St. Amant* is inexplicable. That court's rejection of the jury instruction based upon the verbatim language of *St. Amant* is clear error requiring summary reversal.

IV. THE ACTION OF THE MONTANA SUPREME COURT IN REVERSING THE JURY'S VERDICT IN FAVOR OF THE NEWSPAPER DEFENDANT CONSTITUTES IMPERMISSIBLE GOVERNMENT REGULATION OF FREEDOM OF EXPRESSION.

"Error and misstatement are inevitable in any scheme of truly free expression and debate." *Lorain Journal* v. *Milkovich,* ____ U.S. ____, 106 S. Ct. 322, 88 L.Ed.2d 305 (1985) (Brennan, Jr. dissenting). "The First Amendment requires that we protect some falsehood in order to protect speech that matters." *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 341 (1974). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP* v. *Button,* 371 U.S. 415, 433 (1963).

Through a number of decisions, this court has defined limits on the government's ability to restrict free expression. *See, e.g., Stromberg* v. *California,* 283 U.S. 359 (1931); *Bridges* v. *California,* 314 U.S. 252 (1941); *Roth v. United States,* 354 U.S. 476

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[9] *See, e.g., Bose Corp.* v. *Consumers Union of United States, Inc.,* 466 U.S. at 511 n.30; *Herbert* v. *Lando,* 441 U.S. 153, 156 (1979); *Gertz* v. *Robert Welch, Inc.,* 418 U.S. 323, 332 (1974); *Time, Inc.* v. *Pape,* 401 U.S. 279, 291-92. *See also Wolston* v. *Reader's Digest Ass'n. Inc.* 443 U.S. 157, 163 (1979); *Monitor Patriot Co.* v. *Roy,* 401 U.S. 265, 276 (1971); *Beckley Newspapers Corp.* v. *Hanks,* 389 U.S. 81, 84-85 (1967); *Garrison* v. *Louisiana,* 379 U.S. 64, 75-76 (1964).

(1957); *NAACP* v. *Button,* 371 U.S. 415 (1963). A Court decision, too, is state action and, thus, state regulation. *See New York Times Co.* v. *Sullivan,* 376 U.S. 254, 265 (1964).

In reviewing the evidence in the light most favorable to the plaintiff, the Montana Supreme Court has negated the jury's intervention in protecting freedom of the press. Such court regulation usurps the jury's function in its role as representative of the citizenry to determine the limits to which the government may infringe on freedom of expression. *See* Parker, *Free Expression — The Jury Function,* 65 B.U.L. Rev. 483, 557 (1985).

Recent cases involving free speech emphasize the role of the court in guarding defendants in First Amendment cases from majoritarian intolerance, as expressed through jury verdicts. *Bose Corp* v. *Consumers Union of U.S., Inc.,* 446 U.S. 485 (1984). That judicial control is to be guarded jealously. However, it is easy to forget that the genesis of our jury system lay in a world where common citizens looked to their peers for protection from the tyranny of courts. P. Devlin, *Trial by Jury* n.66 at 159-60 (1956); A. Denning, *Freedom Under Law* 63-64 (1949); Henderson, *The Background of the Seventh Amendment,* 80 Harv. L. Rev. 289, 328 (1966).

Freedom of expression in this country was born in the spirit of debate that preceded our revolution. The trial of colonial printer John Peter Zenger in 1735 for seditious libel established the power of the jury in this area, dooming the use of seditious libel as a restraint on free expression for the balance of our colonial period. Nelson, *Seditious Libel in Colonial America,* 3 Am. J. Legal Hist. 160 (1959).

The court below overlooked the jury's historical function of protecting freedom of expression. Where the jury has acted to protect freedom of expression, courts should not interfere. Parker, *Free Expression — The Jury Function,* 65 B.U.L. Rev. 483, 495 (1985).

CONCLUSION

Because this case presents two serious errors of Constitutional magnitude, your amici urge this Court to grant the Petition for Certiorari and summarily reverse the opinion of the Montana Supreme Court.

Respectfully submitted,

RICHARD M. SCHMIDT, JR.
Cohn and Marks
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 293-3860

Attorney for Amicus Curiae American Society of Newspaper Editors

ARTHUR D. MCKEY
GREGORY P. SCHERMER
Hanson, O'Brien, Birney & Butler
888 17th Street, NW,
Suite 1000
Washington, DC 20006
(202) 298-6161

Attorneys for Amici Curiae

JANE E. KIRTLEY
800 18th Street, NW
Suite 300
Washington, DC 20006
(202) 466-6313

Attorney for Amicus Curiae Reporters Committee for Freedom of the Press

W. TERRY MAGUIRE
P.O. Box 17407
Dulles International Airport
Washington, DC 20041
(703) 648-1000

Attorney for Amicus Curiae American Newspaper Publisher Association